

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2010

Public Authority: British Nuclear Fuels Limited
Address: 1100 Daresbury Park
Warrington
WA4 4GB

Summary

The complainant requested information concerning correspondence between BNFL and private investigators. BNFL provided some redacted information, but refused to disclose the bulk of the information, relying upon the exemptions set out in sections 31(1)(g), 40(2) and 42 of the Act. The Commissioner has concluded that BNFL has not provided sufficient information to demonstrate that section 31(1)(g) is engaged. He has concluded that the majority of the withheld information constitutes personal data and that in relation to most of it disclosure would breach the First Data Protection Principle as it would be unfair. However he has concluded that a small amount of additional information withheld under section 40(2) would not breach the First Data Protection Principle and therefore it should be disclosed. The Commissioner has also ordered BNFL to release some additional information that it agreed was not exempt during the course of the investigation and has recorded a number of procedural breaches in respect of the handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. On 16 June 2006 the complainant made the following request for information to British Nuclear Fuels Limited (BNFL):

"I'd like to request copies of all correspondence, emails, memos and notes of telephone conversations between BNFL and private investigators from January 2004 to today. I'd also like to request copies of all reports or any other information that private investigators have produced for BNFL. Finally, I'd like to request copies of contracts between private investigators and BNFL, or briefings you have provided them with".

3. On 18 June 2006 BNFL acknowledged the complainant's request. BNFL contacted the complainant again on 21 July 2006 to apologise for the delay in replying to his request and stating that it hoped to be able to respond early the following week.
4. On 28 July 2006 BNFL issued a refusal notice to the complainant. It stated that it had engaged the services of private investigators on two occasions in the past 5 years. It also indicated that the investigations were to determine whether confidential information had been leaked to third parties. The refusal notice stated that BNFL considered that the requested information was exempt by virtue of section 31 of the Act, specifically citing subsections 31(1)(g) and 31(2)(b) as the basis for non-disclosure.
5. On 31 July 2006 the complainant requested a review of BNFL's decision. BNFL acknowledged that request on 7 August 2006, stating that it would carry out a review and would provide the complainant with the results as soon as the review had been completed.
6. On 29 September 2006 BNFL wrote to the complainant to communicate the result of the review. The review concluded that the complainant should be provided with three documents in relation to his request, albeit with some personal and confidential details redacted from them in reliance on sections 40(2) and 41 of the Act. The remaining information was still considered exempt under section 31(1)(g). BNFL also stated that some of the information was withheld in order to safeguard commercially sensitive information of the Control Risks Group, though no specific exemption was cited in this regard.

The Investigation

Scope of the case

7. On 3 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - BNFL's extension of the scope of the request to cover the previous 5 years,
 - BNFL's application of the exemptions under sections 31(1)(g) by virtue of 31(2)(b) and 40(2) of the Act to the withheld information,
 - BNFL's application of the public interest test,
 - BNFL's delayed response to the complainant's original request.
8. The complainant clarified to the Commissioner that he had no issue with the bank details being withheld under section 41. Therefore the Commissioner has not considered the information withheld under section 41 in this Decision Notice.

Chronology

9. Unfortunately there was a delay before the case was allocated for investigation, because of the volume of complaints being handled by the Commissioner. On 4 July 2008 the Commissioner wrote to BNFL requesting a copy of the withheld information and further explanation as to BNFL's reliance on sections 31(1)(g), 31(2)(b) and 40(2) of the Act as a basis for withholding the information.
10. Following further correspondence with the Commissioner, BNFL responded on 6 October 2008 and provided the Commissioner with a copy of the information which had been disclosed to the complainant.
11. On 28 November 2008 the Commissioner wrote to BNFL with some further queries regarding its application of the exemptions.
12. On 27 January 2009 BNFL provided the Commissioner with detailed responses to his queries and provided a list of both the withheld information and the material that had been provided

to the complainant. In its letter BNFL indicated that having further reviewed the withheld material it had concluded that in fact a small amount of additional information could be released. The Commissioner has ordered BNFL to disclose this information in the steps section below as it has not been disclosed to the complainant to date.

13. At this stage BNFL also sought to apply section 42 to all of the withheld information. BNFL had not previously relied on this exemption, but now considered that it applied.
14. Despite a number of requests by the Commissioner, BNFL did not provide a complete copy of the withheld information until 10 September 2009.

Analysis

Section 1 – Scope of the request

15. The complainant's request specified that he was interested in information dated between 1 January 2004 and 3 October 2006. As explained above, in the refusal notice BNFL indicated that it had engaged the services of private investigators twice in the previous 5 years. Therefore it appears that BNFL extended the scope of the request to cover a period beyond that of interest to the complainant. The Commissioner agrees with the complainant's assertion that an objective reading of the request was that it was limited in scope to information dated 1 January 2004 to 3 October 2006.
16. In any event the Commissioner has reviewed all of the outstanding withheld information and is satisfied that it falls within the scope of the request as it is within the dates specified. The withheld information consists of the material redacted from documents that were disclosed to the complainant following the internal review and information relating to the investigations that were carried out.

Exemptions

17. BNFL withheld the majority of the outstanding information under section 31(1)(g) on that basis that disclosure would prejudice its ability to investigate improper conduct. It withheld the majority of the information redacted from the documents that were disclosed to the complainant following

the internal review on the basis of section 40(2) which relates to personal data. Section 40(2) was also applied to elements of the material that BNFL had already concluded was exempt by virtue of section 31(1)(g).

18. The Commissioner has considered BNFL's arguments in relation to section 31(1)(g) first before going on to address section 40(2).

Section 31 – Law enforcement

19. Section 31(1)(g) of the Act states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

The purpose in subsection 31(2) cited by BNFL is:

"(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper".

20. When considering the application of a prejudice-based exemption, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (Appeal no EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that

"The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice. " (para 28 to 34).

The Commissioner has followed the test set out above when considering the representations put forward by BNFL.

Relevant applicable interest

21. The Commissioner considers that a function of a public authority can include the performance of any statutory duty which that public authority has the power and responsibility to carry out, by virtue of an enactment or subordinate legislation. It can also cover the performance of duties which

are not set out in statute, but which nonetheless comprise a formal part of the public authority's core business or purpose.

22. BNFL advised the Commissioner that it has a statutory duty under Regulation 22 of the Nuclear Industries Security Regulations 2003 (the NISR) to ensure the security of "sensitive nuclear information". The text of Regulation 22 is set out in the Legal Annex to this decision notice. However the relevant part of Regulation 22 for the purposes of this case is subsection (3) which states that:

"A person to whom this regulation applies must –

(a) maintain such security standards, procedures and arrangements as are necessary for the purpose of minimising the risk of loss, theft or unauthorised disclosure of, or unauthorised access to, any sensitive nuclear information within his possession or control".

23. The Commissioner accepts BNFL's argument that fulfilling the requirements of Regulation 22 constitutes a function for the purposes of the Act. BNFL further argued that in order to fulfil its function it was necessary to monitor compliance with security standards, procedures and arrangements and where necessary investigate specific allegations of non-compliance. BNFL asserted that such investigations were carried out in order to ascertain whether any person is responsible for any conduct which is improper.
24. The Commissioner accepts that investigations into allegations of non-compliance with Regulation 22 may be necessary in order to fulfil the requirements of that statutory provision. He also accepts that such investigations are part of one of BNFL's functions and that the purpose of them is to determine if a person is responsible for any conduct which is improper.
25. BNFL has suggested that an investigation into any alleged unauthorised disclosure of confidential information amounts to the exercise of its functions under Regulation 22 and therefore a relevant function for the purposes of section 31(2)(b). However the Commissioner notes that Regulation 22 of the NISR applies in order to protect 'sensitive nuclear information' which is specifically defined. For the purposes of the NISR 'sensitive nuclear information' has the meaning given in section 77(7) of the Anti-terrorism, Crime and

Security Act 2001. Section 77(7) defines "*sensitive nuclear information*" as,

"(a) information relating to, or capable of use in connection with, any treatment of uranium that increases the proportion of the isotope 235 contained in the uranium; or

(b) information relating to activities carried out on or in relation to nuclear sites or other nuclear premises which appears to the Secretary of State to be information which needs to be protected in the interests of national security;"

26. In view of the above, the Commissioner considers that where BNFL monitors compliance with procedures, standards or arrangements aimed at specifically protecting sensitive nuclear information it is exercising its functions in relation to Regulation 22. This includes investigations into alleged unauthorised disclosure of sensitive nuclear information. However he does not consider that BNFL has demonstrated that this function extends to the investigation of allegations of unauthorised disclosure of any confidential information.
27. However, section 31(1)(g) does not require that information must have been held for the function specified in 31(2)(b). The issue is whether disclosure of the withheld information would be likely to prejudice BNFL's ability to carry out the functions that the Commissioner has accepted it has in relation to investigating improper conduct.
28. The Commissioner is satisfied that in seeking to protect its ability to investigate allegations of improper conduct in connection with Regulation 22, BNFL has identified an applicable interest relevant to section 31(1)(g) and 31(2)(b). In view of this, it is necessary to go on to consider the nature of the prejudice identified and the likelihood of it occurring.
29. BNFL also argued that it had an implied duty to investigate concerns that company officers may have disclosed confidential information, as they could potentially be engaging in improper conduct. On the basis of the submissions provided by BNFL the Commissioner is not satisfied that an implied duty to investigate potential improper conduct constitutes a function for the purposes of section 31(1)(g). Moreover BNFL has not, in the Commissioner's view demonstrated that such an investigation is linked to its core

functions. Therefore the Commissioner has not considered this point argument further in this decision notice.

Nature of the prejudice

30. When considering the nature of the prejudice, the Commissioner has noted the Tribunal's comments in *Hogan v the ICO and Oxford City Council* (paragraph 30):

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."

31. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
32. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemptions *and* he concludes that the prejudice that could arise is not insignificant and is not trivial, the Commissioner will then consider the question of likelihood.
33. BNFL has argued that disclosure of the withheld information in this case would be likely to prejudice its ability to investigate whether a person is responsible for improper conduct for the following reasons:
- i. it would reveal details of the security measures and procedures adopted by BNFL (and related entities) as well as the methods used to investigate potential security breaches, which would materially compromise the effectiveness of those measures and procedures.
 - ii. It would deter individuals from co-operating with investigations and from acting as witnesses particularly given that the information does not indicate that there was evidence to incriminate any of the individuals concerned, nor rule out improper conduct.

34. Having considered the arguments above, the content of the withheld information and the context in which the material was created the Commissioner accepts that disclosure could harm the ability of BNFL to carry the investigations into improper conduct that are part of its functions in relation to Regulation 22 of the NISR. Therefore he is satisfied that a causal link has been established.
35. In reaching the conclusion above the Commissioner has noted that the withheld information does contain evidence provided by witnesses and some detail about the process used to investigate allegations of improper conduct. It is his understanding that the same processes are used irrespective of whether an investigation relates to an alleged unauthorised disclosure of sensitive nuclear information or other material. The Commissioner further considers that any harm would not be trivial or insignificant. In view of this the Commissioner has gone on to consider the likelihood of such harm arising.

Likelihood of prejudice

36. Where the public authority has claimed that disclosure is only *likely* to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*". In this case BNFL has indicated that considers that the 'would be likely to prejudice' limb of the test is relevant.
37. In *England v ICO and London Borough of Bexley* (EA/2006/0060 & 0066) the Tribunal stated that it was impossible to provide:

"evidence of the causal link between the disclosure of the list [of empty properties] and the prevention of crime. That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely".
38. The Commissioner takes the view that, although unsupported speculation or opinion will not be taken as evidence of the likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will

always be some extrapolation from the evidence available, the Commissioner expects the public authority to be able to provide some evidence (not just unsupported opinion) to extrapolate from.

39. The Commissioner has considered all of the correspondence between the complainant and BNFL as well as the submissions that he has received regarding the application of the exemption. Having done so he has concluded that BNFL has not provided any evidence or arguments to demonstrate why the prejudice identified as relevant to section 31(1)(g) is likely to occur.
40. BNFL did not suggest, on the basis of any available evidence, that it had experienced problems obtaining witnesses in the course of its investigations to date or why this would be likely if the withheld material were released. Nor did it indicate the degree to which its investigatory procedures are already known to those who are likely to be the subject of investigation or provide evidence that individuals have attempted to ascertain details of the procedures in order to evade detection. In view of the absence of arguments as to why the prejudice identified is likely to occur the Commissioner is not satisfied that section 31(1)(g) by virtue of section 31(2)(b) is engaged. The Commissioner has therefore gone on to consider BNFL's application of sections 42 and 40(2) below.

Late reliance on exemption not previously claimed

41. During the course of the Commissioner's investigation BNFL sought to rely on the exemption at section 42. In the case of the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)* the Tribunal questioned whether a new exemption could be claimed for the first time before the Commissioner. The Tribunal concluded that it (and by extension the Commissioner) "*may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case*".
42. In this case the Commissioner has decided that it is appropriate to consider BNFL's reliance on section 42 despite the fact that it was applied outside the time limits set down in sections 10 and 17. In reaching this conclusion he has taken into account the potential impact of disclosure of information which ought to be protected by legal professional privilege. He has also taken into account the fact that the original refusal

notice was issued at a relatively early stage of the Act's implementation when experience was more limited.

Section 42 – Legal Professional Privilege

43. BNFL applied cited section 42 in relation to all of the information it deemed to be exempt by virtue of section 31(1)(g). The full text of section 42 is available in the Legal Annex at the end of this decision notice. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023; 4 April 2006)* as:

*“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] * parties if such communication or exchanges come into being for the purpose of preparing for litigation.”*

44. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the principal or dominant purpose of obtaining legal advice.
45. BNFL has claimed that the withheld information is subject to legal professional privilege but has not specified whether it is claiming that litigation or advice privilege applies. Furthermore it has not provided any evidence to support its assertion that the material is subject to legal professional privilege. On the basis of the submissions to date and having reviewed the content of the withheld information the Commissioner has concluded that BNFL has failed to demonstrate why section 42 applies and therefore has determined that the exemption is not engaged.

Section 40 - personal information relating to third parties

46. Section 40(2) of the Act provides an exemption for information which relates to individuals other than the applicant. Personal data is defined in section 1(1)(a) of the Data Protection Act 1998 ('the DPA') as:

"...data which relate to a living individual who can be identified: - from those data, or; from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

47. Personal data is exempt if either of the conditions set out in section 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles as set out in Schedule 1 to the DPA.
48. BNFL applied section 40(2) to individuals' names mentioned in the material that it considered to be exempt by virtue of sections 31 and 42 and several emails. As explained previously, most of the information redacted from the documents that were disclosed to the complainant at the internal review stage was also withheld on the basis of section 40(2).
49. The Commissioner is satisfied that all of the information that BNFL identified as exempt under section 40(2) falls within the definition of personal data as set out in the DPA. It contains the names of living individuals who can be directly identified from those data. Furthermore, having reviewed the withheld information, the Commissioner has concluded that, with the exception of one redaction in the material that was disclosed, all of the withheld information constitutes personal data. The majority of the information is about individuals who were being investigated, including details of when they were interviewed and the evidence they provided. As the Commissioner has concluded that the exemptions in sections 31 and 42 are not engaged, and in view of his role the regulator of the DPA, he has decided that it is appropriate in this case to use his discretion to proactively consider section 40(2) in relation to the additional material.

Would disclosure breach the First Data Protection Principle?

50. BNFL claimed that disclosure would be unfair and therefore would breach the First Data Protection Principle.

51. The First Data Protection Principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

52. In deciding whether disclosure of personal data would be unfair the Commissioner has taken into account a range of factors including:

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and
 - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 ECHR;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

53. Furthermore, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by

disclosure, the Commissioner believes that it may still be fair to disclose information if it can be argued that the legitimate interest in the public accessing the material is compelling. Therefore, when assessing fairness the Commissioner will balance the rights and freedoms of the data subject with the legitimate interests in disclosing the information.

Information redacted from documents disclosed at internal review

54. The redacted information consists of the names of four individuals. The job titles and signatures of two of the four individuals are also included. These people were involved in agreeing and dealing with the provision of services by the Control Risks Group to BNFL. The Commissioner does not consider that disclosing the names or the job titles of the individuals concerned would result in any damage or distress. This is the case particularly given that the information is very limited, relates to their public rather than private lives and all the individuals hold relatively senior and public facing roles within their respective organisations. Information in the public domain already links three of the named individuals to BNFL and the Control Risks Group and therefore disclosure would simply confirm their involvement in arranging the provision of services by one party to the other.
55. In contrast the Commissioner accepts BNFL's argument that placing the signatures that appear in the withheld information into the public domain would pose a risk of identity theft which would be both damaging and distressing to the individuals concerned.
56. The Commissioner is also satisfied that the named individuals would have had a reasonable expectation that their names and the job titles, when held in this context, would be disclosed to the public. This is in view of the fact that they are senior and public facing employees of a public authority subject to the Act and an organisation that provides services to the public sector and the information simply records their involvement in an official capacity in agreeing the provision of services. Indeed in its letter dated 27 January 2009 BNFL acknowledged that the names of senior employees at public authorities and other organisations interacting with them often will not be exempt for the purpose of section 40(2). In contrast the Commissioner does not consider that the individuals whose signatures appear within the material would have had a reasonable expectation of disclosure, particularly in light of the identity theft risk mentioned above.

57. In the Commissioner's view there is a legitimate interest in the public having access to information to ensure that public authorities are accountable and transparent. In this case disclosure of the names and job titles of the individuals concerned would demonstrate that appropriate people of sufficient seniority were involved in arranging the services that the Control Risks Group provided to BNFL. The Commissioner also considers that the aforementioned accountability and transparency is necessary as information security is very important to BNFL, given the sector within which it operates. Moreover he considers that disclosure is necessary as the accountability and transparency discussed above could not be achieved by releasing more limited information.
58. In the Commissioner's opinion any legitimate interest the public has in obtaining the signatures is extremely limited and in any event, he does not consider that disclosure of that information is necessary. In view of this and bearing in mind the expectations of the data subjects as well as the damage and distress they would suffer as a result of disclosure, the Commissioner has concluded that it would breach the First Data Protection Principle to release the signatures.
59. However the Commissioner has concluded that, the data subjects would expect their names and job titles to be disclosed and would not suffer any unwarranted damage or distress if they were released. Moreover, in his opinion, the public has a legitimate interest in access to that information and disclosure is necessary so that the sixth condition of Schedule 2 of the Data Protection Act 1998 is met. In view of this and in the absence of any evidence to suggest that disclosure would be unlawful, the Commissioner has determined that releasing the withheld information would not breach the First Data Protection Principle. Therefore he has ordered BNFL to disclose the redacted information to the complainant.

Other information withheld in its entirety

60. The remainder of the withheld information relates to investigations about alleged improper conduct in the form of unauthorised disclosures of confidential information. It includes the evidence that was provided to the investigators by those under investigation. This evidence itself contains a significant amount of personal data about third parties.

61. The Commissioner understands that no information regarding this or any similar investigation is available in the public domain. If the withheld information were released it would confirm the identity of the subjects of the investigation together with the details of the evidence they supplied to the investigators. It would also provide some detail about the way the investigation was carried out. The Commissioner considers that if the withheld material were disclosed it would result in considerable damage to the individuals' reputations and significant distress. In reaching this conclusion, the Commissioner has taken into account the nature of the allegations and the fact that the material does not identify, nor does it rule out, improper conduct on the part of any of the named subjects of the investigation.
62. The Commissioner has also considered the reasonable expectations of those identified in the information. In his view, neither the individuals who were the subject of the investigation, nor those named in evidence supplied to the investigators would have a reasonable expectation that the information would be disclosed to the public. The material contains free and frank views and a significant amount of detail about a number of BNFL employees. In the Commissioner's view the individuals concerned would have expected material that they have collated and supplied to the investigators to assist their enquiries to be used for that specific purpose and not to be disclosed to the public.
63. The Commissioner recognises that some, though not all of the data subjects, are employees of BNFL who occupy relatively senior positions within the organisation. Whilst in some circumstances, such as those described previously, he considers that senior officials will have a reasonable expectation that information will be disclosed, this is not always the case. In relation to the remaining material he considers that all the data subjects would have a reasonable expectation that the information would not be disclosed given the content and the context in which it was recorded.
64. Notwithstanding the Commissioner's conclusions above, he has gone on to consider whether, the legitimate interests of the public accessing the withheld material are such that it would be fair to disclose it.
65. There is a legitimate interest in the public having access to withheld information in this case to ensure that BNFL is accountable and transparent about the way that it deals with

allegations of improper conduct. This is particularly the case when the allegations relate to unauthorised disclosure of confidential information given the importance of information security in the sector that BNFL operates in. Disclosure would demonstrate the thoroughness of the investigation that the Control Risks Group conducted which ultimately was paid for with public money.

66. Whilst the Commissioner considers the arguments above have some weight in this case he also recognises that the withheld information is somewhat limited. In particular it does not detail the investigators findings and does not include details of the outcome of the investigation. As a result he considers that the degree to which the public would be informed and BNFL held accountable if the withheld information were disclosed is also somewhat limited. Consequently the Commissioner has concluded that, in this case, the legitimate interest in the public having access to the withheld material is not so significant that it would be fair to disclose it. In other words disclosure would, in his view, result in unwarranted prejudice to the rights and freedoms of the data subjects.
67. In view of all of the above, the Commissioner has concluded that all of the remaining withheld information, with the exception of one redaction, is personal data and that disclosure of any of it would breach the First Data Protection Principle as it would be unfair.

Outstanding information redacted from documents disclosed at internal review

68. As explained above, one piece of information that was redacted from a document released following the internal review did not, in the Commissioner's view, constitute personal data. On the basis of the memorandum detailing the outcome of the internal review dated 27 September 2006, BNFL appears to have suggested that this information was commercially sensitive. However, it did not specifically cite an exemption or provide any arguments to the Commissioner to explain why this information had been withheld from the complainant. During the course of his investigation the Commissioner asked for clarification about whether BNFL was relying upon the exemption in section 43 in this regard but it did not provide a response. Therefore, in the absence of any information in this regard, the Commissioner has concluded that BNFL inappropriately withheld this information from the

complainant. He has ordered BNFL to disclose this information to the complainant as part of the steps detailed below.

Procedural Requirements

Section 1 – general right of access

Section 10 – time for compliance with request

69. The complainant made his initial request on 16 June 2006. BNFL acknowledged receipt of his request on 18 June 2006, however it did not confirm that it held the requested information until 28 July 2006, which was outside the 20 working day time limit and therefore it breached section 10(1) in this regard.
70. In addition, in relation to the material that was provided to the complainant at internal review, BNFL breached section 10(1) in failing to make this available within twenty working days of the request.
71. During the course of the Commissioner's investigation BNFL confirmed that in fact some additional information could be released to the complainant. The Commissioner has ordered that BNFL now release this information to the complainant as part of the steps within this decision notice. However in failing to make the information available within twenty working days of the request or by the completion of the internal review, BNFL breached section 10(1) and failed to comply with section 1(1)(b).
72. In relation to the information that the Commissioner has concluded was inappropriately redacted from documents disclosed following the internal review, BNFL breached section 10(1) and failed to comply with section 1(1)(b).
73. The Commissioner has concluded that BNFL was not required to comply with section 1(1)(b) in relation to the remainder of the withheld information as he has found that it is exempt under section 40(2).

Section 17 – refusal of request

74. The Commissioner notes that BNFL did not issue its refusal notice until 28 July 2006, thereby breaching the requirements of section 17(1) of the Act. It also breached section 17(1) in failing to cite sections 40 and 41 until the internal review.

75. In failing to cite section 42(1) until during the course of the Commissioner's investigation BNFL breached section 17(1)(a), (b) and (c).

The Decision

76. The Commissioner's decision is that BNFL did not deal with the following aspects of the request for information in accordance with the Act:

It failed to provide the material that was disclosed following the internal review within twenty working days and therefore breached of section 10(1).

BNFL also breached sections 1(1)(b) and 10(1) in failing to disclose the information that it has agreed can in fact be released within twenty working days of the request.

It inappropriately withheld some information on the basis of section 40(2) and therefore breached section 1(1)(b) and 10(1) of the Act.

It failed to cite an exemption in relation to some information or to make it available to the complainant within twenty working days. BNFL therefore breached section 1(1)(b) and 10(1) in this regard.

BNFL also breached section 17(1) in failing to issue a refusal notice within twenty working days of the request or to cite sections 40(2) and 41 until the internal review was completed. In failing to cite section 42 until during the course of the Commissioner's investigation, BNFL breached sections 17(1)(a), (b) and (c).

77. However the Commissioner has concluded that BNFL complied with the Act in refusing to provide some of the withheld information on the basis that it was exempt by virtue of section 40(2). In fact the Commissioner has concluded that there is no 1(1)(b) obligation in relation to the majority of the withheld information because it is exempt by virtue of section 40(2).

Steps Required

78. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the information that was originally redacted from documents released following the internal review but which BNFL indicated could be released in its letter to the Commissioner dated 27 January 2009.
 - To disclose the information that was redacted from the documents released following the internal review but in respect of which no exemption was specifically cited.
 - To disclose the names and job titles of individuals identified in the documents that were disclosed to the complainant following the internal review.
79. For the avoidance of any doubt, the Commissioner has included a Confidential Annex to this decision notice indicating precisely what information should now be released to the complainant.
80. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

81. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

82. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of March 2010

Signed

**Jo Pedder
Senior Policy Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

1- General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

10 - Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

17- Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

31- Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

40- Personal information

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

42- Legal professional privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

The Nuclear Industries Security Regulations 2003

Duties of persons with sensitive nuclear information

22. - (1) Subject to paragraph (2), this regulation applies to the following persons -

(a) a responsible person who keeps sensitive nuclear information on any premises other than nuclear premises for

which there is an approved security plan;

(b) any company designated by the Secretary of State under section 19(2) of the Atomic Energy Authority Act 1971 [7];

(c) any person who has possession or control of sensitive nuclear information for the purposes of planning, designing or constructing any proposed nuclear premises or any installation or other facility on nuclear premises;

(d) any contractor or consultant of any person referred to in sub-paragraphs (a) to (c) who has possession or control of sensitive nuclear information; and

(e) any holding company (as defined in section 736(1) of the Companies Act 1985 [8]) whose subsidiary (as defined in that section) falls within any of sub-paragraphs (a) to (c) and which itself has possession or control of sensitive nuclear information.

(2) This regulation does not apply to any person who is not (and is not expected to be) involved in activities on or in relation to any nuclear premises.

(3) A person to whom this regulation applies must

(a) maintain such security standards, procedures and arrangements as are necessary for the purpose of minimising the risk of loss, theft or unauthorised disclosure of, or unauthorised access to, any sensitive nuclear information within his possession or control,

(b) comply with any direction given by the Secretary of State requiring him to take such steps as are necessary or as are specified in the direction for that purpose,

(c) ensure that each of his relevant personnel who

(i) is specified in such a direction as a person whose suitability requires investigation and assessment by the Secretary of State, or

(ii) falls within a description of persons who are so specified,

is a person who has been approved by the Secretary of State as being of suitable character and integrity, having regard to the need to ensure the security of any sensitive nuclear

information within the possession or control of the person to whom this regulation applies, and

(d) report to the Secretary of State any event or matter of a kind specified in paragraph (6) that relates to any sensitive nuclear information within his possession or control as soon as practicable and in any event within 24 hours of its becoming known to him, specifying the nature of the event or matter and, in the case of an event, the date and time it occurred and the apparent reason for it.

(4) If it is not reasonably practicable for the person in question to make a written report under paragraph (3)(d) within the period specified in that paragraph, he must make the report orally and confirm it in writing within 48 hours of the event or matter becoming known to him.

(5) In any other case the report must be made in writing.

(6) The events and matters are -

(a) any theft or attempted theft, or any loss or unauthorised disclosure, of sensitive nuclear information, or any suspected such theft, loss or disclosure;

(b) any unauthorised access to sensitive nuclear information or any attempt to gain such access;

(c) any other event or matter which might affect the security of any sensitive nuclear information.

The Anti-terrorism, Crime and Security Act 2001

Section 77(7) provides that:

“sensitive nuclear information means -

(a) information relating to, or capable of use in connection with, any treatment of uranium that increases the proportion of the isotope 235 contained in the uranium; or

(b) information relating to activities carried out on or in relation to nuclear sites or other nuclear premises which appears to the Secretary of State to be information which needs to be protected in the interests of national security;”